84-6667

No. 84 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

v.

FRANK BLACKBURN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Allan Blumstein
(Counsel of Record)
Matthew E. Fishbein
Eric M. Freedman
Steven Gey
Douglas G. Morris
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

John DiGiulio
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383-0078

Supreme Court, U.S.
FILED
APR 15 1985
Alexander L. Stevas, Clerk

69 pp

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 14 1985
GILBERT E. GANUCHEAU
CLERK

No. 84-3381

RONALD S. MONROE,

Petitioner-Appellant,

versus

84-6667

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary, Angola,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/4/84, 5 Cir., 198_, _____F.2d___)

(January 14, 1985.)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 27 FOR STAY OF THE MANDATE

REHG-6

QUESTIONS PRESENTED

This petition raises three important federal constitutional challenges to Louisiana's administration of its local statutes regarding administration of the death penalty in criminal cases.

As we show, in raising those challenges, petitioner has at all times proceeded in timely fashion in full compliance with all state and federal requirements as they affect state post-conviction remedies and federal habeas relief.

The three issues are as follows:

1. After finding that petitioner had exhausted his state remedies, the District Court held that the State's post-conviction suppression of material, exculpatory evidence that another man had confessed to the crime for which petitioner had been sentenced to death, violated petitioner's federal constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963). But, instead of directing petitioner's release from custody unless the State afforded him a new trial, the District Court determined that petitioner should seek to obtain a new trial from the very same state courts which had already denied him relief.

In affirming this result, the Fifth Circuit held that petitioner had failed to show that his right to a "fair trial" was prejudiced by the suppression of the evidence which created a reasonable doubt as to his guilt because the evidence was suppressed after trial.

In United States v. Agurs, 427 U.S. 97 (1976), this Court drew a sharp distinction between newly discovered

evidence suppressed by the State and newly discovered evidence obtained from a neutral source, holding that when a defendant proved that evidence had been suppressed by the State he should not be held to the usual standard applied to a motion for a new trial on the basis of newly discovered evidence, because this would denigrate the "special significance [of] the prosecutor's obligation to serve the cause of justice." 427 U.S. at 111.

Accordingly, this petition raises the following important question of federal constitutional law which should be decided by this Court:

Where the State unlawfully has suppressed material, exculpatory evidence after a petitioner's conviction, do the fundamental due process concerns embodied in Brady and Agurs require that the petitioner be afforded a new trial -- until now the invariable remedy for a prosecutional suppression of material, exculpatory evidence?

2. In Witherspoon v. Illinois, 391 U.S 510 (1968), this Court reserved the question of whether a defendant convicted by a "death qualified" jury might "establish that the jury was less than neutral with respect to guilt." 391 U.S. 520 n.18.

That is precisely what the petitioner proposed to establish in the District Court. However, the District Court rejected petitioner's claim without holding a hearing on the issue.

The Fifth Circuit, affirmed, having previously ruled that this contention did not state a federal constitutional claim. Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S 976 (1979). The Eight

Circuit -- in a recent opinion recognizing the split in the circuits on this issue and urging this Court to grant certiorari -- has in fact granted habeas corpus relief on an identical claim based on similar evidence. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, No. 83-2113 (8th Cir. January 30, 1985) (en banc).

Accordingly, this petition raises the question of whether certiorari should be granted to resolve a conflict between the circuits on an issue of central importance to the administration of the capital punishment statutes in the several states which prescribe that penalty in criminal cases?

3. Petitioner was represented at trial by an attorney who, during the month in which petitioner's trial took place, tried two other capital cases, prepared for a third, and handled a full docket of felony cases. As a result, petitioner's attorney failed completely to investigate petitioner's case, presented an inadequate defense at the trial on the merits and at the sentencing stage, and argued to a Witherspoon qualified jury that the death penalty was immoral and should never be applied in any circumstances.

Accordingly, this petition raises the important question of whether the Fifth Circuit erred in upholding the denial of petitioner's claim that, in the circumstances of this case, he was denied the effective assistance of counsel?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
The Crime and the Conviction	3
The Suppression of Material, Exculpatory Evidence	4
Post-Conviction Proceedings in the State Courts	5
The Hearing Before the Magistrate	6
The District Court's Review	8
The Fifth Circuit Decision	10
REASONS FOR GRANTING THE WRIT	11
I. THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE COURTS BELOW CORRECTLY RULED THAT THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE, IN VIOLATION OF BRADY V. MARYLAND, DOES NOT REQUIRE THE STATE EITHER TO GRANT PETITIONER A NEW TRIAL OR RELEASE HIM FROM CUSTODY	11
II. THIS COURT SHOULD GRANT THE WRIT TO SETTLE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE WHETHER A "DEATH-QUALIFIED" JURY IS PREDISPOSED TO FAVOR THE PROSECTUION ON THE ISSUE OF GUILT AND IS UNREPRESENTATIVE OF THE COMMUNITY AS A WHOLE	16
III. THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL EVEN THOUGH HIS ATTORNEY WAS SO OVERBURDENED THAT HE FAILED ALTOGETHER TO INVESTIGATE FAVORABLE EVIDENCE	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Brady v. Maryland, 373 U.S. 83 (1963)	ii, 5-15
Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd, No. 83-2113 (8th Cir. January 30, 1985)	iii, 17-19
Jackson v. Virginia, 443 U.S. 307 (1979)	13
Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984)	17
Knighton v. Maggio, 105 S.Ct. 32 (1984)	18
McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985)	17
Monroe v. Blackburn, 748 F.2d 958 (5th Cir. 1984)	2, 10, 17
Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)	ii, 17
State v. Monroe, 266 So.2d 1345 (La. 1978)	3
State v. Monroe, 427 So.2d 867 (La. 1983)	5
Stoll v. Gottlieb, 305 U.S. 165 (1938)	13
Strickland v. Washington, 104 S.Ct. 2052 (1984)	21-22
Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30 (1924)	13
United States v. Agurs, 427 U.S. 97 (1976)	ii, 11-15
United States v. Cronic, 104 S.Ct. 2039 (1984)	21-22
Witherspoon v. Illinois, 391 U.S. 510 (1968)	ii, iii, 3, 16, 21
Witt v. Wainwright, 53 U.S.L.W. 3647 (U.S., March 5, 1985)	17-19
Woodward v. Hutchins, 104 S.Ct. 752 (1984)	18
Woodward v. Sargent, 758 F.2d 694 (8th Cir. 1985)	17
In re Wright, 282 F.Supp. 999 (W.D. Ark. 1968)	15

No. 84 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

v.

FRANK BLACKBURN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Ronald S. Monroe respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit denying his federal constitutional challenges to the sentence of death imposed upon him by the State of Louisiana.

Petitioner is incarcerated in the Louisiana State Penitentiary at Angola, Louisiana pursuant to a judgment of conviction of murder in the first degree. His death sentence was stayed by the District Court for the Eastern District of Louisiana on January 4, 1984 and that stay of execution continues in effect.

OPINIONS BELOW

The report of the United States Magistrate recommending that the writ of habeas corpus be granted, filed on February 2, 1984, appears as Appendix A. The unreported opinion of the District Court for the Eastern District of Louisiana, granting petitioner's writ of habeas corpus, but

failing to order that he be given a new trial, filed on February 28, 1984, appears as Appendix B. The District Court's Order approving the Findings and Conclusions of the Magistrate, filed on February 15, 1984, appears as Appendix C. The District Court's denial of petitioner's motion to amend its judgment, issued orally on April 25, 1984, appears as Appendix D. The Fifth Circuit affirmed the District Court's order on December 4, 1984. Monroe v. Blackburn, 748 F.2d 958 (5th Cir. 1984). Its opinion appears as Appendix E. A timely motion for rehearing and for rehearing en banc was denied on January 14, 1985. The order is noted at 752 F.2d 646 (5th Cir. 1985).

JURISDICTION

The opinion of the Court of Appeals affirming the District Court's order was entered on December 4, 1984. The Court of Appeals denied a timely motion for rehearing and rehearing en banc in orders dated January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

2. Amendment VI to the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed; . . . and to have the Assistance of Counsel for his defense."

3. Amendment XIV, Section 1 to the Constitution of the United States provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Crime and the Conviction

In the early morning hours of September 10, 1977, an armed intruder murdered Lenora Collins in her New Orleans home by stabbing her repeatedly in the chest and neck. When the police came to arrest petitioner an hour later, they found him asleep in his bed next door, where he lived with his family.

The only evidence that linked Monroe to the crime was the identification by the victim's two preteenaged children, Joseph and Theodise. No physical evidence such as fingerprints, footprints, a murder weapon or blood samples linked Monroe to the crime.

On January 23, 1980, Monroe was convicted of the first degree murder of Collins and sentenced to death.[1/] In accordance with the standards laid down by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), the jury that convicted petitioner was selected through procedures that excluded venire members who expressed doubts about imposing the death penalty, or who stated with certainty that they

---

1/ A previous conviction had been reversed on appeal. State v. Monroe, 266 So. 2d 1345 (La. 1978).

could not under any circumstances, recommend the death sentence.

The Suppression of Material, Exculpatory Evidence

It is undisputed that six months after petitioner's conviction, the New Orleans police were told by Michigan authorities that another man, George Stinson, the former husband of the deceased Lenora Collins, had confessed to the crime for which petitioner had been sentenced to die. It is equally undisputed that the New Orleans police violated petitioner's constitutional rights by suppressing that information.

The basic facts concerning this suppression are as follows:

In July 1980, George Stinson murdered his common law wife Erma Jean Lofton, in Pontiac, Michigan by stabbing her repeatedly.

While investigating Stinson's murder of Lofton, Detective Joseph Gallardo of the Pontiac, Michigan Police Department received information that Stinson had confressed to the stabbing of his previous wife - Lenora Collins - three years earlier in New Orleans.

Detective Gallardo thereafter contacted the New Orleans Police Department to convey this information to Louisiana authorities. He spoke to Sergeant John McKenzie.

Sergeant McKenzie made detailed and contemporaneous notes of his conversation with Gallardo. These notes -- in no uncertain terms -- demonstrate the highly material and exculpatory nature of the evidence Gallardo conveyed. They state in pertinent part:

> While in jail Stinson got to bragging about how he had murdered his wife in Michigan to cell mate.
>
> Stinson also bragged that he had killed his first wife in New Orleans on 9/10/77 and threatened his step-children into identifying neighbor as killer . . . .
>
> Det. Gallardo also got information from a second source that Stinson had killed New Orleans wife Collins.

It is undisputed that the state never disclosed to Monroe or his counsel the information Detective Gallardo conveyed to Sergeant McKenzie, namely, that another man, a former husband of Lenora Collins, had confessed to the crime for which Monroe was convicted and sentenced to die. Monroe's counsel learned of the Stinson material and its suppression by the State only late in 1983, and then only by a fluke.

Post-Conviction Proceedings in the State Courts

On December 27, 1983, after his direct appeal was denied, State v. Monroe, 426 So. 2d. 867 (La. 1983), petitioner filed a motion in the New Orleans Criminal District Court seeking a new trial or in the alternative, post-conviction relief, and a stay of the execution then scheduled for just after midnight on January 4, 1984.

The motion explicitly raised each of the three constitutional challenges to the validity of his conviction which petitioner has set forth in this petition.

With regard to the claim that the State had unconstitutionally suppressed material, exculpatory evidence, all of the facts concerning that suppression which were later presented to the District Court in Monroe's federal habeas petition were presented to the state court, except for the McKenzie notes. Defense counsel were unaware of these notes

because they were still buried in the files of the New Orleans Police Department.

On January 3, 1984, the state court, after refusing to hold an evidentiary hearing on any of Monroe's claims, or to sign subpoenas for out-of-state witnesses to substantiate his Brady claim, dismissed the proceedings and denied the motion for a stay of execution. That ruling was affirmed by the Louisiana Supreme Court later that evening.

The Federal Habeas Petition

On December 30, 1983, Monroe filed a petition for habeas corpus in the District Court for the Eastern District of Louisiana, challenging the constitutionality of his conviction and sentence. He raised each of the three federal constitutional challenges set forth in this petition.

The District Court, after giving considerable deference to the proceedings in the state courts, stayed Monroe's execution on January 4, 1984, only eight hours before it was scheduled to take place. It did so after explicitly finding that Monroe had exhausted his state court remedies. The District Court ordered that a hearing be held before a United States Magistrate to determine whether material, exculpatory information had been withheld from Monroe in violation of the Brady rule. The District Court, however, refused to hold any evidentiary hearing on petitioner's other claims, and summarily dismissed them in an opinion dictated from the bench.

The Hearing Before the Magistrate

Only in response to Monroe's subpoena duces tecum issued in connection with the evidentiary hearing in the

District Court did the State in mid-January 1984 produce the McKenzie notes to defense counsel. For a period of some three weeks before, while the prosecution and defense counsel were litigating in both the state and federal courts over the Brady issue, the prosecution never bothered to check the official New Orleans Police Department file on the Collins murder where the McKenzie notes sat untouched. The State -- which had objected in state court to Monroe's request for discovery and an evidentiary hearing -- had let Monroe come within eight hours of execution without looking at its own files.[2/]

A full and fair evidentiary hearing, as ordered by the District Court, was held before Magistrate Marcel Livaudais on January 30, 1984.[3/] Three days after the hearing, Magistrate Livaudais, after finding that petitioner had exhausted his state remedies, determined that Monroe's Brady claim had merit and recommended that a writ of habeas corpus be granted. (Appendix A.) After hearing all the evidence, including the testimony of George Stinson, the magistrate found that the evidence adduced at the hearing indicated "a parallelism between the Michigan and New Orleans murders":

> In each Stinson was the husband, in each a possible motive may have been the wife's apparent disaffection,

---

2/ If the prosecution did examine those files prior to the issuance of the subpoena duces tecum, its conduct is even more outrageous.

3/ Stinson and Gallardo both testified at the hearing before Magistrate Livaudais. Three New Orleans police detectives also testified at the hearing, and the deposition of Sergeant McKenzie was introduced into the record.

> in each a stabbing and in each a suggestion of witness intimidation.

(Appendix A at 8-9.)

He concluded that the State had suppressed material, exculpatory evidence in violation of Monroe's constitutional rights since, "evaluated in the context of the entire record," the Stinson confession "creates a reasonable doubt [as to Monroe's guilt] that did not otherwise exist." In the magistrate's words,

> It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime for which he has been convicted coupled with a suggestion of a second source of information in support.

(Appendix A at 8.)

The District Court's Review

On February 15, 1984, the District Court accepted the Magistrate's findings and conclusions and granted a writ of habeas corpus. In a "Memorandum Opinion" of February 29, 1984, the District Court, on a de novo review of the record, adopted the Magistrate's report as its own findings and conclusions. (Appendix B.) In finding that the suppressed evidence created "a reasonable doubt as to Monroe's guilt that did not otherwise exist" (Appendix B at 6), the District Court made at least three crucial points: (i) that no physical evidence linked Monroe to the murder, (ii) that testimony in the trial record "makes the assertion that Stinson committed the murder plausible," and (iii) that the only evidence directly linking Monroe to the murder -- "the eyewitness testimony of the victim's two children" -- is marked by "disturbing" aspects.

> Although this testimony would seem to clearly establish Monroe's guilt, the Court is disturbed by many aspects

> of their testimony . . . Detective Gallardo's testimony, at the evidentiary [hearing] concerning the facts surrounding the allegation that Stinson intimidated witnesses in Michigan as well as the Bridges testimony concerning the possibility that the children may have been coerced, supports the Court's concern that the children's testimony should be weighed against the exculpatory evidence . . . .

(Appendix B at 5-6.)

The District Court affirmed the Magistrate's finding that the suppressed new evidence created "a reasonable doubt as to Monroe's guilt that did not previously exist":

> The Court's reading of the record reveals there was no sign of a forced entry into the Collins' home. This, coupled with the fact that no murder weapon or blood stained clothing or rags were found at or around Monroe's home, indicate that Monroe may not have committed the murder. The record also reveals that Monroe's mother testified that on the day of the murder Stinson came by the Collins' home and tried to see his ex-common law wife. After he was told that she was not at home he said that he would come back that evening. This evidence makes the assertion that Stinson committed the murder plausible.

(Appendix B at 5.)

But, having found a Brady violation and granted a writ of habeas corpus, the District Court failed to order the invariable remedy for a Brady violation -- petitioner's release from custody unless the State granted him a new trial. Instead, the court remitted Monroe to the Louisiana courts to obtain whatever post-conviction relief those courts might afford him. The District Court made clear that it had "not ordered the State court to have another hearing," (Appendix D at 4) but left unclear precisely what the state courts were supposed to do.

On February 15, 1984, petitioner moved the District Court to amend its judgment insofar as it failed to direct Monroe's release from custody unless the State afforded him a

new trial. After oral argument on April 25, 1984, the District Court denied the motion from the bench, but granted a certificate of probable cause. (Appendix D.)

The District Court expressed the opinion that a state-court motion for a new trial is the only remedy for a Brady violation that occurs after a conviction is obtained. (See Appendix D at 14.)

The Fifth Circuit Decision

The Fifth Circuit affirmed the District Court's ruling, holding that "Monroe has failed to show that his right to a fair trial was prejudiced by the post-conviction suppression of evidence." 748 F.2d at 960.

It added "there is no possibility that Monroe's rights will be prejudiced," since "all of the information will be considered" in "an additional state hearing . . . ." Id.

The Fifth Circuit also affirmed the District Court's denial of the other federal constitutional challenges to petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE COURTS BELOW CORRECTLY RULED THAT THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE, IN VIOLATION OF BRADY V. MARYLAND, DOES NOT REQUIRE THE STATE EITHER TO GRANT PETITIONER A NEW TRIAL OR RELEASE HIM FROM CUSTODY

The precise issue in this case has never been addressed by this Court: what is the proper federal constitutional remedy where a court has determined that, after petitioner's conviction, the State has unlawfully suppressed evidence that creates a reasonable doubt as to petitioner's guilt. The courts below have held that the State violated petitioner's due process rights under Brady v. Maryland, 373 U.S. 83 (1963), and that the suppressed evidence tended to show that Monroe is innocent of the crime for which he is condemned to die. Nevertheless, the lower courts have remitted petitioner to the state court, which has already refused to grant relief on this precise claim.

In all other cases, the invariable remedy for a Brady violation has been a new trial. Petitioner has not found a single case in which a new trial has not been granted in circumstances similar to this case, nor has the State cited any in the proceedings below. But for one fact -- the post-conviction setting of the illegal suppression -- a new trial undoubtedly would have been ordered here. Indeed, the District Court stated that at first it was "tempted" to order the State to grant a new trial. (Appendix D at 10.)

The District Court and the Court of Appeals did not grant a new trial because those courts adopted a myopic and

narrow view of what the right to a "fair trial" means in terms of the prosecution's obligation to see that justice is done. Under the lower courts' interpretation of Brady, a trial is fair if the State does not suppress evidence until after the defendant is convicted. Thus, as soon as the conviction has been obtained, the defendant's Brady rights diminish significantly -- or are even extinguished. Even if a petitioner can convince a federal court -- as this petitioner has -- that the state has suppressed material, exculpatory evidence, his only relief will be a second opportunity to present the same claims to a state court which has already denied him relief.

The fact that the evidence was suppressed after, rather than before or during, trial does not lessen the fundamental unfairness to petitioner inherent in such suppression, diminish the prosecutor's duty to disclose such material, or alter the finding that petitioner may be innocent. The practical effect of enforcing a lesser remedy for post-conviction Brady violations is grimly evident in this case: presumably the state court can refuse to grant petitioner a new trial and order that his execution be carried out, despite the undisputed and undisturbed findings of the federal courts below that the suppressed evidence creates a reasonable doubt as to petitioner's guilt.

The decisions below misinterpret and pervert Brady and Agurs. The Brady rule applies with equal force in the state and federal courts. The federal courts have already made the determination, both on the facts and law, that Monroe's constitutional rights were violated by the unlawful suppression of evidence which creates a reasonable doubt as

to his guilt. In those circumstances, the state may not constitutionally enter judgment on the conviction, since the Constitution invalidates any conviction based upon evidence that does not demonstrate guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 309 (1979). Hence, can there be doubt that if the future state proceedings ordered below resulted in any outcome other than a new trial, that the federal courts, upon a renewed petition for habeas corpus, would be constrained to grant one?

Further proceedings in the state court would be wholly improper for another reason. The doctrines of collateral estoppel and res judicata preclude the prosecution from religitating factual issues and legal conclusions that have already been determined by the federal courts. See, e.g., Stoll v. Gottlieb, 305 U.S. 165, 170 (1938); Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924). In an era when the federal courts have expressed concern about the efforts of state prisoners to proliferate federal habeas corpus proceedings, it is anomalous, to say the least, for a federal court to give the State a second opportunity to relitigate its factual and legal claims.

The District Court's remedy merely provides the state court with an opportunity to issue a ruling that is inconsistent with that of the federal court. Thus, the result would be exactly what the District Court hoped to avoid -- inconsistent rulings that strain the desired harmonious relations between state and federal courts.

Furthermore, the notion that Monroe should be remitted to the state courts so that they may adjudicate his new trial motion by state law standards directly contravenes

this Court's precedent. The Brady principle is bottomed on the fundamental unfairness of prosecutorial suppression of exculpatory evidence, see United States v. Agurs, 427 U.S. 97, 110-111 (1976). Accordingly, to effectuate the Brady rule, this Court has fashioned a federal constitutional standard for determining when a defendant is entitled to a new trial after prosecutorial suppression of exculpatory evidence. Thus, the Court has drawn a sharp distinction between newly-discovered evidence suppressed by the state and newly-discovered evidence obtained from a neutral source:

> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Agurs, supra, 427 U.S. at 111. That rationale applies just as strongly to post-conviction suppression as to any other Brady violation. The Fifth Circuit simply ignored this aspect of the Agurs decision.

This issue is of extraordinary public importance. If, in a post-conviction setting, a defendant's only remedy is a state court motion for a new trial to be judged by state law standards, instead of the Brady-Agurs federal constitutional standard, the prosecution has no incentive to uphold its obligations in the post-conviction setting. United States v. Agurs, supra, 427 U.S. at 111. In fact, the ruling actually encourages the prosecutor to suppress exculpatory evidence. If the suppression succeeds, the conviction and sentence -- perhaps a death sentence -- will stand. If the suppression fails, the prosecutor is no worse off -- a

defendant is left with the same remedy he would have had if the state had not suppressed.

Clearly, the Brady-Agurs standard should apply so as to discourage prosecutorial misconduct after trial, just as it discourages prosecutorial misconduct before and during trial. The sovereign's "overwhelming interest that justice shall be done," United States v. Agurs, supra, 427 U.S. at 111, does not end with the trial. In re Wright, 282 F. Supp. 999 (W.D. Ark. 1968) (granting new trial on basis of prosecutor's post-trial suppression of exculpatory evidence).

In fact, after trial, when a defendant's rights may no longer be vigilantly protected by watchful defense counsel in the adversary process, the burden on the state to ensure that justice be done is even greater. The Court should hold that the Brady-Agurs rule applies at whatever stage of the legal process the unlawful suppression of evidence occurs.

Contrary to the ruling of the Fifth Circuit, the rulings below are prejudicial to petitioner in the most fundamental sense. If the state has suppressed evidence which creates a reasonable doubt as to his guilt -- and the federal courts below have so found -- there is no reason why he should now be required to engage in further extended post-conviction proceedings in the state courts to obtain the new trial to which he is clearly entitled.

II.

THIS COURT SHOULD GRANT THE WRIT TO SETTLE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE WHETHER A "DEATH-QUALIFIED" JURY IS PREDISPOSED TO FAVOR THE PROSECUTION ON THE ISSUE OF GUILT AND IS UNREPRESENTATIVE OF THE COMMUNITY AS A WHOLE

As we noted, the jury that convicted petitioner was selected through procedures that exclude venire members who express doubts about imposing the death penalty, or who state with certainty that they could not, under any circumstances, recommend the death sentence. This systematic exclusion of a sizable and distinct group denied petitioner his right to a fair and impartial jury by significantly reducing the possibility that the jury would be a representative cross-section of the community on the issue of guilt. This resulted in a jury that was conviction-prone and biased in favor of the prosecution.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that it was permissible to exclude from the sentencing phase of a capital trial those jurors who made "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ." Id. at 522 n.21 (emphasis in original). But the Court left for another day the issue of whether such a jury would be fair and impartial with respect to the determination of guilt or innocence. The Court specifically stated, "a defendant convicted by such a jury in some future case might still attempt to establish that the

jury was less than neutral with respect to guilt." Id. at 517-518, 520 n.18.

That is precisely what petitioner proposed to establish before the District Court. However, the District Court rejected petitioner's claim without holding a hearing on the issue. The Fifth Circuit affirmed the District Court. Monroe v. Blackburn, supra, 748 F.2d at 961. The Fifth Circuit had previously rejected this claim in Spenkellink v. Wainwright, stating that even if the factual basis for the claim were true, there would be no violation of the federal constitution. Spenkellink v. Wainwright, 578 F.2d 582, 593-96 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

Since the Fifth Circuit's ruling in this case, however, the Eighth Circuit has held, on the basis of statistical studies substantially identical to the ones offered below, that Witherspoon-qualified jurors are prosecution-prone on issues of fact, in violation of the Sixth and Fourteenth Amendments. Grigsby v. Mabry, No. 83-2113 (8th Cir. January 30, 1985) (en banc). The Eighth Circuit has also held that its Grigsby ruling is to be applied retroactively. Woodward v. Sargent, 753 F.2d 694 (8th Cir. 1985).

Thus, there is a direct conflict in the circuits on this issue. See also McCleskey v. Zant, 753 F.2d 877, 901 (11th Cir. 1985) (rejecting claim); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984) (same). As Justice Marshall recently noted:

> This Court will certainly grant certiorari to resolve the issue in the immediate future because it presents a clear split in the courts of appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice system is undoubted.

Witt v. Wainwright, 53 U.S.L.W. 3647, 3648 (March 5, 1985) (Marshall, J., dissenting). See also Knighton v. Maggio, 105 S. Ct. 32, 32-33 (1984) (Brennan, J., dissenting); Woodward v. Hutchins, 104 S. Ct. 752, 754-55 (1984) (Brennan, J., dissenting).

There is no significant distinction between the record in this case and that in Grigsby. Petitioner introduced in the District Court a complete transcript of the testimony in Grigsby, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd, No. 83-2113 (8th Cir. January 30, 1985) (en banc). Petitioner also introduced into the record below the affidavit of Edward J. Bronson, whose testimony was relied on by the court in Grigsby, along with several studies that are relevant to this issue. Professor Bronson was present in New Orleans and would have been called by Monroe as an expert witness had the District Court permitted the taking of testimony. After reviewing the voir dire in this case in the context of the relevant sociological literature, Professor Bronson concluded as follows:

> I have concluded that Mr. Monroe was prejudiced in this case by adverse effects on the representativeness of the jury caused by death qualification and its tendency to lead to a greater proneness toward convictions and recommendations of death. To summarize briefly, it is clear from the voir dire transcript that the jury in this case was not representative of a fair cross-section of the community, inasmuch as a distinct and cognizable group was excluded from the jury, namely, those who expressed strong opposition to the death penalty, including those prospective jurors who stated that they could be fair and impartial on the question of guilt despite their opposition to the death penalty.

(Document 32 of the Record on Appeal, Affidavit of Edward J. Bronson ("Bronson Aff.") ¶ 8.)

The evidence proffered here is substantially identical to that before the Grigsby court; indeed the

testimony in that case is part of the present record. Unlike the petitioner in Witt v. Wainwright, supra, petitioner in this case did not raise the juror bias issue as an afterthought or in a successive petition. The issue was raised in petitioner's initial petition in both state and federal courts, and petitioner made every effort to present to the District Court the evidence recently relied upon by the Eighth Circuit in Grigsby. This Court should therefore grant the petition and resolve the conflict among the Circuits.

III.

THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL EVEN THOUGH HIS ATTORNEY WAS SO OVER-OVERBURDENED THAT HE FAILED ALTOGETHER TO INVESTIGATE FAVORABLE EVIDENCE

Petitioner was represented at trial by an attorney who was so overburdened that he could not possibly have rendered the effective assistance of counsel required by the Constitution. During January 1980, when petitioner's trial took place, his counsel, John Lawrence, tried two other capital cases and prepared for a third, all in addition to a full docket of non-capital felony cases. As Lawrence has put it, trying three capital cases in four weeks "damned near killed me." (Document 1A of Record on Appeal, Affidavit of John Lawrence ("Lawrence Aff."), annexed to Monroe's Petition for Habeas Corpus.)

As a direct result, Lawrence's preparation for the sentencing phase of the trial was simply inadequate. Lawrence made no independent effort to collect and present favorable information about Monroe's character and background. If he had conducted even the simplest investigation, he would have found numerous witnesses who would have testified -- independently and consistently -- to Monroe's nonviolent character, gentle disposition, generosity, and conern for family and friends.

Instead of developing and presenting evidence such as this, Lawrence made only a single argument during the penalty phase: the death penalty should never be inflicted under any circumstances. Thus he turned the penalty phase into a philosophical debate that he was foredeoomed to lose,

for any venire member who shared this view had been excluded from the jury for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). Indeed, the Fifth Circuit recognized "that there was very little reason to expect an anti-capital punishment argument to persuade a Witherspoon-qualified jury." 748 F.2d at 962. But the Court of Appeals nonetheless held that Lawrence "made a reasonable choice with the evidence available to him." Id. That conclusion was wrong.

In light of the persuasive evidence readily available to him, Lawrence's performance was woefully inadequate, falling far short of the minimum standard required by this Court's rulings in Strickland v. Washington, 104 S. Ct. 2052 (1984) and United States v. Cronic, 104 S. Ct. 2039 (1984). Whatever else can be said about that standard, it means at least this: due process entitles a capital defendant to something more than one-third of a lawyer.

The time pressures on petitioner's counsel prevented him from doing even a rudimentary investigation of petitioner's case. By his own testimony, Lawrence had to rely primarily on the transcript from the first trial, and assume that little additional evidence was available. Thus Lawrence did not even visit the community where the crime took place, nor did he interview potential witnesses who may have known about another person's involvement in the crime. (Lawrence Aff. ¶ 8.)

Lawrence failed to investigate or present evidence supporting the one theory that would have cast doubt on the State's case. He never explored the possibility that George Stinson murdered Lenora Collins, even though he knew of that

possibility. As the present record shows, that line of investigation would have been promising indeed. But Lawrence failed to pursue it -- not as a tactical matter, but simply because he did not have the time to develop this all-important information. As a result, Monroe was sentenced to death.

This Court has recognized that in some instances the circumstances surrounding the representation of a defendant may be so prejudicial that no lawyer, even a fully competent one, could be expected to provide effective assistance. United States v. Cronic, supra, 104 S. Ct. at 2047. However, the Court did not specify what those circumstances are that make a defendant's representation constitutionally defective. Cronic was a non-capital case in which the defendant relied mainly on the allegation that his counsel was young, inexperienced, and given only 25 days to prepare for trial. The Court found that the representation provided to the defendant was sufficient under the Sixth Amendment.

In this case, however, the circumstances are much more grave: petitioner's life was a stake and, in preparing his defense, his attorney had only enough time to read a transcript of petitioner's previous trial. Because he was unaware of the salient facts of petitioner's case, Lawrence "failed to function in any meaningful sense as the Government's adversary." Id. at 2051.

This Court should grant the writ to determine whether counsel in a capital case is constitutionally ineffective if he (a) fails to make a meaningful plea at the penalty phase, based on evidence relating to his client's particular circumstances, for the defendant's life and

(b) fails, simply because of time pressures, to investigate the defendant's only viable defense as to guilt.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 15, 1985

Respectfully submitted,

ALLAN BLUMSTEIN
(Counsel of Record)
Matthew E. Fishbein
Eric M. Freedman
Steven Gey
Douglas G. Morris
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10154
(212) 644-8000

John DiGiulio
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383-0078

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE — CIVIL ACTION

versus — NO. 83-6277

ROSS MAGGIO, Warden, ET AL — SECTION: F/5

FINDINGS AND CONCLCUSIONS

Petitioner, Ronald S. Monroe, is a state prisoner presently incarcerated in the Louisiana State Penitentiary at Angola, Louisiana. He was convicted of first degree murder of Lenora Collins on January 26, 1978 and on that same date the jury recommended the death sentence. The Supreme Court of Louisiana reversed the conviction and sentence on December 15, 1978. State v. Monroe, 366 So.2d 1345 (La. 1978). On January 23, 1980 petitioner was retried on the same charge, convicted, and again the jury recommended the death penalty. The court sentenced petitioner on February 6, 1980 to death by electrocution. The Louisiana Supreme Court affirmed the conviction and sentence on April 6, 1981. State v. Monroe, 397 So.2d 1258 (La. 1981), rehearing denied.

Petitioner's execution was scheduled for January 5, 1984 at 12:01 a.m. He applied to this Court for a writ of habeas corpus and for post-conviction relief pursuant to 28 U.S.C. §2254 on December 30, 1983. Previously, petitioner sought post-conviction relief, a new trial and a stay of execution in the Criminal District Court, Parish of Orleans. On December 29, 1983 the request for the stay was denied. The request for a new trial,

1031

DATE OF ENTRY FEB 3 1984

FEE
PROCESS
X CHARGE
INDEX
ORDER
HEARING
DOCUMENT No. 54

for a continuance on motion for a new trial, and for a stay of execution was denied on January 3, 1984 by the Criminal District Court in Orleans Parish. This Court denied petitioner's application for a stay of execution on January 3, 1984. The Louisiana Supreme Court denied petitioner's application for post-conviction relief and for a stay of execution on January 3, 1984. Monroe v. Maggio, ___ So.2d ___, No. 83-KP-2651 (La. January 3, 1984). Thus, petitioner has exhausted his state remedies. Minor v. Lucas, 697 F.2d 697 (5th Cir. 1983); Rose v.Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982).

The matter was heard on January 4, 1984 and this court considered several grounds alleged by petitioner in support of his application for a stay and for post-conviction relief. The Court granted the petitioner's stay until February 7, 1984 on the basis of ground two of petitioner's application to permit an evidentiary hearing to review the validity of petitioner's claim of a denial of due process. The Court specifically found that all other grounds of petitioner's application lacked merit. (Record Document 12 at 14).

An evidentiary hearing was held on January 30, 1984 to consider the merits of the second ground alleged in this petition for habeas corpus. (Record Document 1 at 7). Ground two raises the issue of whether petitioner's Sixth Amendment rights were violated by the State's suppression of evidence which was allegedly exculpatory in nature and which could have indicated that

0347

petitioner is not guilty of the crime for which he was convicted and sentenced to death. The petitioner argues that he was denied due process of law under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1964) because the State failed to relay to defense counsel the fact that a Michigan police detective informed the New Orleans Police Department of the possible confession of another man to the crime for which petitioner has been convicted.

The prosecution's suppression of evidence when it has been requested by the accused, if the evidence is favorable to him and is material to his guilt or his punishment, violates due process whether or not the prosecution is in good faith or bad faith. Brady, 83 S.Ct. at 1196-1197. If the defendant makes a general request for all exculpatory evidence or makes no request at all for evidence, the prosecutor violates his constitutional duty to disclose if "his omission is of sufficient significance to result in the denial of defendant's right to a fair trial." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976).

The prosecution is not required to supply the defense with "a complete and detailed accounting ... of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972). Undisclosed evidence is not material if it is only possible that it might have helped the defense or affected the outcome of the trial. Agurs, 96 S.Ct. at 2400. Omitted evidence is material and its suppression violates due process if

10319

it creates a reasonable doubt that did not otherwise exist when it is considered in light of the entire record. Id. at 2402. If reasonable doubt about defendant's guilt does not exist with or without evaluation of the ommitted evidence, a new trial should not be granted. However, if the additional evidence, even if it is of relatively minor importance, creates a reasonable doubt, the evidence is material and the prosecution's suppression of it amounts to constitutional error. Id.; Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981).

Further, the fact that the prosecuting attorney is not shown to have knowledge of the exculpatory evidence does not neutralize the nondisclosure. "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld." The police department is part of the prosecution; the state has the duty to disclose and the fact that the police had not informed the prosecuting attorney does not excuse the nondisclosure of material exculpatory evidence under Brady. Barbee v. Warden Maryland Penitentiary, 331 F.2d 842, 846 (5th Cir. 1964).

The State must prove the defendant's guilt beyond a reasonable doubt in order to convict him. Jackson v. Virginia, 443 U.S. 307, 309 (1979). In order to determine if the "cmitted evidence creates a reasonable doubt that did not otherwise exist," the court must "evaluate all the evidence as it would bear on the deliberations of a factfinder." Cannon v. State of Alabama,

10319

558 F.2d 1211, 1213-1214 (5th Cir. 1977). See Agurs, 427 U.S. 112, 96 S.Ct. at 2401.

As aforesaid, petitioner was convicted in January, 1980. In Louisiana a motion for a new trial based on discovery of new and material evidence may be filed within one year after verdict. LSA-C.Cr.P. Art. 851(3), 853. Evidence adduced at the hearing before the undersigned established that in July, 1980, Detective Joseph W. Gallardo of the Pontiac, Michigan Police Department contacted the New Orleans Police Department and told them that in the course of investigating one George Stinson's murder of his common-law wife in Michigan, he had received information that Stinson may have also murdered his previous wife, Lenora Collins, three years earlier in New Orleans. On September 23, 1980, he again telephoned the New Orleans Police Department and spoke to Sergeant John McKenzie, platoon commander of the homicide division of the New Orleans Police Department. Gallardo told McKenzie of a tape recorded interview (Plaintiff Exhibit 2) he had had with Francis Lee McWilliams,[1] Stinson's cellmate in the Oakland County Jail, where Stinson had been incarcerated after his arrest for Lofton's murder.

During the interview, McWilliams related several conversations he had had with Stinson, during which Stinson first confessed

---

[1] McWilliams had been transported to New Orleans to testify at the hearing but was not called by either party.

to stabbing Lofton, and then stated that "the same thing happened" to his first wife -- Leonora Collins. Detective Gallardo also reported information he had received that Stinson had threatened Collins' two children -- Joseph and Theodise [2] -- into identifying Monroe as their mother's killer.

Sergeant McKenzie scribbled notes of his conversation with Gallardo, and then after verifying the existence of a New Orleans case file wrote a three page summary in more legible and chronological order. (Defendant Exhibit 1, testimony of McKenzie, at 12,13). Petitioner contends that this three page summary made on September 23, 1980 (Plaintiff Exhibit 5) constituted Brady material which was not made available to him until produced earlier in these proceedings. Sergeant McKenzie explained that the top and center portions of page one of the summary was information he gleaned from the New Orleans case file, the bottom portion of page one and all of page two was information given him by Detective Gallardo and that page three constituted notes of his follow up after the telephone call. (Defendant Exhibit 1 at 18). He placed the information in the pigeonhole mailbox of the detectives in charge of the case. (Defendant Exhibit 1 at 52-53). The detectives did not recall receiving the information. The summary was located in the case file and produced by counsel

---

[2] The eyewitnesses then aged fourteen and thirteen respectively who testified at the New Orleans trial.

00351

for respondent upon discovery request in this habeas proceeding. This was petitioner's first access to it.

This summary states in pertinent part:

> "While in jail Stinson got to bragging about how he had murdered wife in Michigan to cellmate.
>
> Stinson also bragged that he had killed his first wife in New Orleans on 9-10-77 and threatened his step-children into identifying neighbor as killer.
>
> . . .
>
> Det. Gallardo also got information from a second source that Stinson had killed New Orleans wife Collins." (Plaintiff Exhibit 5 at 2).

It is undisputed that State authorities suppressed the evidence concerning George Stinson that they received from Detective Gallardo. Respondent has admitted that neither Ronald Monroe, his attorneys, nor anyone acting on Monroe's behalf was ever informed by anyone acting on behalf of the State of any of this information. There was no showing that this non disclosure was willful or malicious. For some unexplained reason the information never got to the attention of the prosecutor. This fact that the District Attorney's office may not have known of the information communicated by Detective Gallardo to the Police Department is immaterial. The obligation to disclose attaches whenever the police in the prosecuting jurisdiction possess exculpatory evidence. United States v. Agurs, 427 U.S. 97, 110 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Freeman

00352

v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)

The second element of proof in establishing a Brady violation is that the suppressed evidence is favorable to the defendant. It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime for which he has been convicted coupled with a suggestion of a second source of information in support. Stinson's denial that he confessed the New Orleans murder to his cellmate in Michigan does not, of itself, render the evidence unfavorable. His Michigan attorney protected his interests and secured a grant of immunity from prosecution for the New Orleans murder. (Stinson Exhibit 1). Nonetheless, a confession at this time under these circumstances might adversely effect whatever Michigan release from custody rights he enjoys. His Michigan sentence was confinement for a minimum term of ten years, a maximum of twenty-five. (Plaintiff Exhibit 8).

The final element, materiality of the suppressed evidence is also established. The suppressed material (Plaintiff Exhibit 5) enhanced by the evidence adduced at the hearing sufficiently creates a reasonable doubt that did not otherwise exist. A parallelism between the Michigan and New Orleans murders was shown. In each Stinson was the husband, in each a possible motive may have been the wife's apparent disaffection, in each a stabbing and in each a suggestion of witness intimidation. The State trial

U.S.D.C.

judge did not have the advantage of having this evidence produced to him some seven months after trial when it surfaced. Some three years after trial a different State judge heard petitioner's post-conviction claims, but even then did not have the text of the suppressed evidence (Plaintiff Exhibit 5), rather only a suggestion concerning the Michigan information. A reasonable doubt has been shown to now exist, when had not formerly, evaluated in the context of the entire record.

Petitioner has satisfied Brady - Argus criteria. His ground two of this petition for a writ of habeas corpus is meritorious. It is, accordingly, RECOMMENDED that a writ of habeas corpus be GRANTED and that the Court issue whatever order(s) be deemed appropriate.

New Orleans, Louisiana, February 2, 1984.

MARCEL LIVAUDAIS, JR.
United States Magistrate

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal.

0C35.4

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
FEB 29 8 30 AM '84
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, ET AL	*	SECTION "F" (5)

MEMORANDUM OPINION

This matter came before the Court on the Petition of Ronald S. Monroe for a Writ of Habeas Corpus, and was referred to United States Magistrate Livaudais for an evidentiary hearing. 28 U.S.C. 636 (6)(1)(B). Pursuant to the Court's order the Magistrate held an evidentiary hearing and issued findings and recommendations.

On February 14, 1984 the respondents filed objections to the Magistrate's findings and recommendations. When objections to a Magistrate's report are filed the Court is requried to make de novo findings as to all portions of the report that are subject to an objection. 28 U.S.C. 636(b)(1)(c). After carefully considering the transcript of the evidentiary hearing as well as all supporting documents in light of the respondents' objections, the Court believes that the Magistrate's findings and recommendations are without error, and the Court adopts the Magistrate's report as its own findings and conclusions. In compliance with the mandate of 28 U.S.C. 636 (b)(1)(c) the

DATE OF ENTRY FEB 29 1984
4
DOCUMENT No. 46

Court is issuing this Memorandum Opinion in order to address the respondents' objections to the report.

The respondents first complain about the Magistrate's conclusion that the petitioner's complaint does not raise a claim that is cognizable under the theory of Brady v. Maryland 373 U.S. 83 (1964) and its progeny. In this regard they raise three objections.

First, they contend that petitioner's claim is nothing more than a request for a new trial based on newly discovered evidence. This contention is clearly in error. The petition, accompanying legal memoranda and the issues raised at the evidentiary hearing clearly indicate that petitioner bases his request for relief in Federal court on the fact that during the post-conviction relief period the State possessed exculpatory evidence and failed to turn it over to the defendant. Such a claim is cognizable under Brady.

Second, the respondents contend that the State is under no duty to give a defendant exculpatory evidence which was obtained after the defendant was convicted. In granting petitioner's request for a stay of execution, the Court held that the duty to disclose exculpatory material continues beyond the trial of a criminal case up to and including the time that an accused may apply for a new trial. In re Petition of Larry James Wright, 282 F.Supp. 999 (W.D. Ark. 1968). The State points to the fact that the Court in Wright failed to cite Brady and argues that this case does not impose a continuing

00111

obligation under Brady, to disclose exculpatory evidence. This argument exalts form over substance and is without merit. The Brady cases stand for the proposition that due process is denied because the trial is fundamentally unfair when the prosecution fails to give the defendant exculpatory evidence that is material to an accused's guilt or innocence. These cases turn on the belief that society benefits when our system of criminal justice is fair, and rejects the sporting notion of justice. These same concerns were expressed by the court in Wright. In that case Judge Miller held that it was unfair and a violation of due process for a prosecutor to withhold exculpatory evidence which was acquired while the accused could file a motion for a new trial. The analysis used in Wright closely parallels the reasoning applied in Brady. It supports this Court's holding that it is fundamentally unfair and contrary to society's notions of justice for a prosecutor to withhold material exculpatory evidence which he acquires while the defendant is entitled to file a motion for a new trial. Wright did not cite Brady, but it clearly adopted Brady's mandate and purpose.

Third, the respondents contend that Wright is distinguishable because the facts that were in the prosecutor's possession were more credible and were more clearly probative than the material held by the police authorities in New Orleans. This objection goes to the standard of materiality will be examined in this opinion.

0412

The respondents complain that the information given to the New Orleans police is based on hearsay and rumor and is, therefore, not credible.

To the extent that this complaint goes to the admissibility of the Brady material, this contention is irrelevant. Sellers v. Estelle, 651 F.2d 1074 (1981) cert. den. 102 S.Ct. 1292. The assertion that the information that was given to the New Orleans Police Department was not credible and does not rise to the level of Brady material is without merit. This argument is undercut by the fact that after Officer Mckenzie received the information from Detective Gallardo he found it sufficiently credible to merit his further investigation. More importantly, at the evidentiary hearing Stinson admitted making the statement in reference to Lenore Collins' death "... that she was killed the same way Erma Lofton was." Magistrate's Hearing 1/30/84 at 55. Although Stinson attempted to deny that this statement was an admission that he killed Ms. Collins, his former common law wife, this statement could be viewed by a trier of fact as a confession which would by logical necessity exculpate Monroe. See, Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981); A.B.A. Standards for Criminal Justice 11-21(c). At the least, it is material bearing on the guilt or innocence of petitioner which a State court should be obliged to consider in a request for new trial; material that was heretofore unavailable.

Since there was no allegation that Monroe's attorney made a request for this evidence, the proper standard for

determining whether the evidence that was withheld is material is whether it creates a reasonable doubt that did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976); Canon v. State of Alabama, 558 F.2d 1211 (5th Cir. 1977). To make this evaluation the Court has carefully examined the trial transcript from Monroe's second trial. United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978); Cannon, supra. This new evidence creates a reasonable doubt that did not otherwise exist. The Court's reading of the record reveals there was no sign of a forced entry into the Collins home. This, coupled with the fact that no murder weapon or blood stained clothing or rags were found at or around Monroe's home, indicate that Monroe may not have committed the murder. The record also reveals that Monroe's mother testified that on the day of the murder Stinson came by the Collins home and tried to see his ex-common law wife. After he was told that she was not at home he said that he would come back that evening. This evidence makes the assertion that Stinson committed the murder plausible.

The only evidence that directly linked Monroe to the murder was the eyewitness testimony of the victim's two children. Although this testimony would seem to clearly establish Monroe's guilt, the Court is disturbed by many aspects of their testimony. First, the Court believes that it is most curious that Joseph Collins ran into the Monroe household to seek assistance when Monroe was, allegedly, in the process of murdering his mother. Second, Detective Gallardo's testimony, at the evidentiary

0114

concerning the facts surrounding the allegation that Stinson intimidated witnesses in Michigan as well as the Bridges testimony concerning the possibility that the children may have been coerced, supports the Court's concern that the children's testimony should be weighed against the exculpatory evidence by a State court.[1] This is not to say that a trier of fact might not conclude that the children's testimony is credible. The Court expresses no opinion on this matter. The Court is, however, faced with the task of evaluating the record to determine the possible effect that the evidence that was withheld might have upon a trier of fact.

In light of the Court's careful evaluation of the record, the fact that Stinson made a statement that could be reasonably construed as a confession leads this Court to find that this evidence creates a reasonable doubt as to Monroe's guilt that did not previously exist. The Court was, therefore, obliged to issue the Writ of Habeas Corpus on the ground that Monroe's due process Brady rights were violated. Austin v. McKaskle, No. 82-1418 slip op. (5th Cir. Feb. 3, 1984).

In reviewing the record from Monroe's post conviction motion before the Criminal District Court for the Parish of Orleans the Court finds, contrary to respondent's assertion, the the trial court denied Monroe the opportunity to effectively

---

[1] For reasons best known to respondents, the Collins children were not called to testify at the evidentiary hearing before the Magistrate.

raise the claim that his Brady rights were violated. Respondent admits at this hearing that Monroe was unable to present the exhibits to the trial court which were produced at the evidentiary hearing held by the United States Magistrate. Monroe was also unable to introduce in the trial court the testimony elicited at the evidentiary hearing.

Since the evidence came into the possession of the authorities in New Orleans after Monroe's conviction but before the expiration of the time that a motion for a new trial based on newly discovered evidence could have been filed, this Court finds that the taint caused by the State's violation of Monroe's Brady rights unconstitutionally impaired his right to file a motion for a new trial or obtain post conviction relief. Since the Court is obliged to fashion a remedy that disposes of the claim so as to do what justice and the law require, 28 U.S.C. 2245, the Court is empowered to fashion a remedy that redresses the deprivation Monroe actually suffered. Thus, the Court entered an order which requires the State to provide to Monroe whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on newly discovered evidence c. f. Dowd v. United States, 340 U.S. 206 (1955).

This Court expresses no opinion regarding the guilt or innocence of Monroe. Our obligation is to decide whether any aspect of the State court criminal proceeding was constitutionally defective, if the State court fails to do so. That

issue has now been decided. The period during which Monroe could request a new trial was tainted with constitutional infirmity because material exculpatory matter bearing on Monroe's guilt or innocence was suppressed.

It is now the obligation and duty of the State court to grant Monroe post-conviction relief rights that comport with his constitutional rights.

New Orleans, Louisiana, this 28th day of February, 1984.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

00417

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
FEB 15 11 49 AM '84
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA	*	SECTION "F"(5)

O R D E R

The Court having reviewed the Findings and Conclusions of Magistrate Livaudais, the transcript of hearing held on January 30, 1984 and the exhibits received, and after considering Respondent's Objection to Magistrate's Findings and Conclusions, accepts the Magistrate's Findings and Conclusions and finds that Petitioner's due process rights during the post-conviction relief period following his trial were unconstitutionally deprived because material exculpatory matter bearing directly on his guilt or innocence was suppressed by the local prosecuting authority after his conviction in violation of the United States Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1964).

Now that this Court has determined the Federal constitutional question the State courts of Louisiana should find it possible to provide the post-conviction review to which Petitioner is entitled. Therefore,

FEB 15 1984

DATE OF ENTRY

FEE
PROCESS
CHARGE
INDEX
ORDER
HEARING
DOCUMENT No.

00338

IT IS ORDERED:

That the Petition of Ronald S. Monroe for a Writ of Habeas Corpus is granted; and

IT IS FURTHER ORDERED:

That Petitioner's date of execution is postponed and the State of Louisiana is directed to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based upon the exculpatory material which the State courts did not have an opportunity to consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction relief rights under Louisiana law.

Written reasons will follow shortly.

New Orleans, Louisiana, this 15th day of February, 1984.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
'84 APR 27 P 3:24
LORETTA G. WHYTE
CLERK

* * * * * * * *

RONALD S. MONROE	*	
	*	PAUPER CASE
VERSUS	*	
	*	
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA	*	NO. 83-6277
	*	SECTION "F"

* * * * * * * * * * * * * * * * * * *

Proceedings on Petitioner's Motion to amend judgment held in the above entitled and numbered cause on April 25, 1984, before The Honorable Martin L. C. Feldman, U. S. District Judge.

* * * * *

A P P E A R A N C E S:

For the Plaintiff: JOHN DIGIULIO, ESQ.
331 St. Ferdinand
Baton Rouge, La., 70802
and
DOUGLAS MORRIS, ESQ., and Alan Blumstein, Esq.
345 Park Ave.
New York, N. Y. 10022

For Defendant: WILLIAM CAMPBELL, ESQ., and SUSAN HUNT
619 South White St.
Appeals Division
New Orleans, La., 70119

* * * * *

REPORTED BY RICKEY P. MARSHALL, OCR.

FEE
PROCESS
CHARGE
INDEX
DOCUMENT

PROCEEDINGS, APRIL 25, 1984:

MR. DIGIULIO: Your Honor, John Digiulio, for Ronald Monroe. I would like to introduce Douglas Morris and Alan Brumstein, of PAUL, WEISS, RIFKIND, WHARTON and GARRISON.

I would ask the Court's permission to permit Mr. Blumstein to argue the motion this morning.

THE COURT: Certainly. You're welcome here, Sir.

MR. BLUMSTEIN: Good morning, Your Honor. This is a motion by the petitioner to amend the order and judgment that has previously been filed in the habeas corpus proceedin

The amendment that we seek if a direction that the petition be released from custody unless the state affords him a new trial.

As we pointed out in our papers, this is the remedy, so far as we can tell, that has been granted in every other Brady case we have been able to find, that is, every case in which the Court has found a violation of Brady.

Our essential proposition is that under Brady and subsequent cases, this new trial remedy is the only appropriate remedy, and that is so because the essence of the Brady rule -- I'm quoting from the Agurs decision, is its overriding concern with justice of the finding of guilt.

When a Court has found as this Court has found, that

the state has suppressed exculpatory evidence which creates a reasonable doubt as to the defendant's guilt, all in violation of the prisoner's Constitutional rights, I respectfully submit I don't know how that violation can be remedied without affording the defendant a new trial. I will also urge this proposition upon Your Honor.

Ultimately, no matter what procedural course the future proceedings in this case takes that will have to be the outcome.

To demonstrate that, I would like to focus on what would happen if we went back to the State Court in accordance the judgment as it is presently written for post-conviction relief. I think in the course of that focusing, I can explore some of the differences between our position and the State's position.

As I see it, there are a number of possibilities as to what might happen in State Court. Possibly an evidentiary hearing.

I would like to suggest to Your Honor that the last thing in the world we need in this case is another evidentiar hearing for the simple reason that we had one. We had it here before Magistrate Livaudais. It was a full hearing. It was a fair hearing. We had witnesses down from Michigan, including two prisoners in the custody of the Michigan authorities.

There were detailed findings of fact. Your Honor

gave de novo review to those findings of fact, and confirmed them. The notion that we should now go back to the State Court and have another evidentiary hearing just strikes me as being almost ludicrous. Let's remember the Brady claim was squarely presented to the State Court back in December in a motion for a new trial, and we asked for a hearing, and the State said no. We came here. We did get the hearing. We prevailed at the hearing. It is almost bazaar that the remedy is that we should now go back to the State Court to have another hearing in which the State is going to argue that the State Court should make findings of fact contrary to what this Court has already found.

THE COURT: I have not ordered the State Court to have another hearing. I have ordered the State Court to discharge its Constitutional responsibilties as this Court has done by giving him a hearing on a motion for a new trial.

In considering the material not presented to the State Court at the time, a previous request for a new trial was made. If anything bazaar is going on in this courtroom right now, Sir, it's your convenient overlooking of the fact that the man's Brady rights were violated, not during the period of his conviction, but during the period of his post-conviction relief. His trial was a

perfectly valid, Constitutionally proper trial, in which he was found guilty of murder.

MR. BLUMSTEIN: Well, may I --

THE COURT: The Constitutional taint occurred after his conviction.

MR. BLUMSTEIN: I understand that, Your Honor. I didn't mean to overlook that. I was going to come to it later on.

THE COURT: I suggest when you do you not use the word "bazaar" again.

MR. BLUMSTEIN: I will not. I'm sorry. Let me deal with that. I think the State argues and I think Your Honor has indicated to me that you agree that the man had a fair trial, and since the violation took place during the post-conviction, the remedy should be as Your Honor --

THE COURT: I ordered the State to Grant this petitioner whatever post-conviction relief he was entitled to under State law, taking into account the material regarding the so-called confession by another inmate which the Court had not had an opportunity to consider at the time the petitioner filed his first request for a stay of execution and a heaviest relief in the State Court system.

This Court has discharged its Constitutional obligation. Now it's up to the State to decide how they are going to discharge theirs.

I found absolutely no Constitutional infirmity with

the man's trial.

MR. BLUMSTEIN: I understand that.

THE COURT: And you agree also, I take it, under Dowd I have the right to fashion whatever remedy is appropriat in the best interest of justice.

MR. BLUMSTEIN: I have no doubt about that.

THE COURT: Since his trial was not Constitutionally infirm, why, and what right --What jurisdiction do I have to order the State to Grant him a new trial? Isn't it up to the State to decide whether or not he should be granted a new trial? Isn't aht why we have the Federal and State system?

MR. BLUMSTEIN: Yes, Your Honor, except that in determi that issue, the question to be decided is an issue of Federal Constitutional law, which I suggest you have already decided.

THE COURT: I have already decided that during the period of post-conviction relief, his Brady rights were violated, and that he was entitled to have a request for a ne trial heard on the basis of the material, which was subsequently disclosed in this Court. State Courts have never considered that material. It is up to the State Courts, having considered that material, to decide whether the man is entitled to a new trial.

MR. BLUMSTEIN: By what standard, Your Honor?

THE COURT: By the very standard he was given a fair trial in the first place.

MR. BLUMSTEIN: Well, the State says that the standards to be applied are the State's standards. Would it lead to a verdict of acquittal?

What I'm suggesting to Your Honor is that the Agur's decision tells us that can not be the standard. The standard should be the Federal standard announced in Agur's, reasonable doubt.

Your Honor has found that the evidence which is suppressed -- which was suppressed creates that reasonable doubt.

THE COURT: Evidence which the State never had a chance to consider. The fact that a Federal Court might believe there is reasonable doubt isn't necessarily a compelling reason for the Federal Court to tell a State Court to give the men a new trial, which in the first instance was a fair trial.

MR. BLUMSTEIN: Well, with all due respect, I think the finding of the concept of a fair trial is in a fairly artificial and limited way. There is a process that goes on. The suppressed evidence in this case was a confession.

One of the interesting things about a confession is that it can come at any time. Some confessions come minutes or hours after a crime is committed.

Other confessions -- there is the expression "death

bed confession."

The notion that coincidentally this confession did not come till after the trial was over and therefore was not in existence at the time of trial -- the notion that this means that the trial was, for Brady purposes, a fair trial I don't think is correct.

THE COURT: You're assuming that the man is innocent. I didn't find that the man was innotcent. I found that the material was of sufficient dignity to rise to the level of Brady material. It did create a reasonable doubt.

If you are asking me whether or not I think the man is innocent, I'll have to tell you no, not on the basis of the hearing that was held. You mentioned that there were two witnesses broughr down from prison in Michigan. They did not testify.

MR. BLUMSTEIN: One did testify, Your Honor.

THE COURT: I don't think the important one did. The detective testified. So I don't know whether the man is guilty or innocent. I know that the period of his post-conviction relief was tainted and was Constitutionally inform. I also know that his trial was not. It was not infirm or tainted.

It seems to me that the State has the obligation to decide whether on the basis of that material he should be given a new trial.

MR. BLUMSTEIN: Well, I have nothing to add, Your Honor.

That's my argument

THE COURT: Well, you cite "in re Wright"

MR. BLUMSTEIN: Yes.

THE COURT: I would like some comment on that, because this is a serious issue.

As I recall "Wright", the man had already exhausted his State Court remedies. That is why the Federal Judge there did not send it back to the State, but ordered a new trial. This is different, you see.

I have two concerns. I need not only be concerned about the violation of the Brady standard, which I take very seriously, but I also need to balance the interest of the State of Louisiana and the Federal Government.

I don't believe that Federal Judges should just go running around the country telling State Courts what to do. I think I made that clear in my opinion. If you want us to do that, then you should have Congress change the law and not give State Courts the right to even hear these things. Bring them here and let us hear them.

State Court Judges think we are anointed for life and are not subject to public pressure, and so why should they deal with them when we should? That's not what the law is. The law gives these people multiple opportunities. In the name of balancing Federal and State relations. If I order a new trial where there was a perfectly valid trial in the

first place, it seems to me I would do great violence to that fundamentally. That is why I think wisely the Court has spoken and said Judges should fashion remedies that are appropriate. Here it seems to me that the remedy that was appropriate was to find that his rights were violated during the period of post-conviction relief and that that is what the State Court needs to look at.

You can continue.

MR. BLOOMSTEIN: I just want to comment on "in re Wright". As I recall the decision, Your Honor, the issue of what the appropriate remedy was was just not raised. The Court dealt with Brady in the context of suppression after the conviction and just granted the traditional Brady remedy. I have nothing else to add, Your Honor.

THE COURT: Ms. Hunt, do you have anything to add which might make me rule against you?

MS. HUNT: I'll try not to.

THE COURT: I struggle with this very much. I must say that at first I was tempted to order the State to grant a new trial. I guess it's fair to say that the State should discharge its responsibiliy.

MS. HUNT: Your Honor, I believe that is the role that the State should play at this point. I don't think there's any difficulty in the State's ability to discharge its responsibility. As your Honor pointed out in the memorandum opinion in this case, the State and the Federal Court share

an equal responsibility for redressing violations of Constitutional rights.

THE COURT: I wish for once they would accept that responsibility.

MS. HUNT: That is occasionally a problem with the State Courts, as Your Honor has pointed out. They do not conduct full hearings. In this particular case, there was opportunity in State Courts to conduct a full hearing. If you will review the record in the case, what happened was that a continuance was denied the the petitioner did not have an opportunity to --although given an opportunity to have a hearing, no hearing took place.

The crucial distinction or the reason that a hearing now in State Court is necessary is that the evidence which this Court found most important to the resolution of the issue in the case, that evidence was not before the State Court and it is totally consistent with principles of comity.

THE COURT: That evidence could have been before the State Court if the Court had granted a hearing in the first place.

MS. HUNT: Your Honor, the evidence was not discovered. I'm speaking physically of the McKenzie notes. The evidence was not discovered until a subpoena duces tecum was served on respondents.

Once the Federal Court petitioned it, the proceedings had already begun. The evidence was not known of although the allegations of the existence of the evidence perhaps existed. The evidence itself did not come to light.

THE COURT: Ms. Hunt, this is an extremely serious case. This is a case where a man has been sentenced to death. I don't know if he's innocent or not. The allegations that this had occurred were made to the State Court. My point is that a hearing could have been held at that point, and these facts could have come to light. Frankly, they could have been more fully developed than they were developed in the hearing before Magistrate Livaudais.

MS. HUNT: In that light, Your Honor, I see no problem with the remanding of the case for such a hearing in the State Court.

THE COURT: I don't see any problem. I want to stress that. This Court feels very strongly about the State discharging its responsibilities in this instance. If this Co has any suspicion, or had, that those responsibilities had not been discharged, then I will discharge them for the State.

MS. HUNT: Your Honor properly has concern that the State Court system discharge its responsibility. It seems to me there is nothing to indicate that the State Court would not give a full hearing. No harm could come in this

in this very serious matter from having the most full hearing possible.

THE COURT: Not only a full hearing, but serious consideration.

MS. HUNT: There's nothing to indicate that the State would not take this matter seriously.

I think the State Court's behavior in the past showed that they would be just that.

THE COURT: Well, I'm not satisfied with what they have shown in the past.

MS. HUNT: I have nothing further, Your Honor.

THE COURT: Mr. Digiulio?

MR. DIGIULIO: Your Honor, very briefly, just to set the record straight, I know it has been some time.

The Petitioner's application for a hearing on this Brady question was denied, on the same papers that this Court granted a hearing on.

THE COURT: I'm aware of that.

MR. DIGIULIO: The only hearing we were granted was effectiveness of counsel, which we did not have time to put together.

THE COURT: You mean at the State Court level?

MR. DIGIULIO: Yes.

THE COURT: I'm thoroughly aware of that. I don't like the way it was handled at the State level at all.

MR. DIGIULIO: Thank you, Your Honor.

THE COURT: The motion is denied.

My opinion was clear. This Court has discharged its Constitutional responsibility.

At this point, to order a new trial would be, in the Court's view disrupt a very delicate balance between the State and Federal Government, because the trial of Mr. Ronald Monroe was not Constitutionally firm, only his period of post-conviction relief when exculpatory material was clearly suppressed by prosecuting authorities.

Material which bears materially on his innocence and which this Court expects the State due countenance of.

Motion is denied.

(Whereupon, the hearing was concluded.)

* * * * *

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed and qualified official court reporter for the United States District Court, Eastern District of Louisiana.

I further certify that the above and foregoing is a true and correct transcript of the proceedings in the above entitled matter, and on the date above specified, and that said transcript is a true and correct transcription of my stenographic notes.

Dated this 27 day of April, 1984, at New Orleans, Louisiana.

Rickey P. Marshall

RICKEY P. MARSHALL
Official Court Reporter
U. S. District Court
Section "F"

(1943). *See also Kerr*, 96 S.Ct. at 2124 ("[A]s a general rule 'appellate review should be postponed ... until after final judgment has been rendered by the court.'") (quoting *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967)). The district court has not denied either proposed consent decree, but merely has deferred ruling pending a hearing, and there has been no showing that this deferral precludes workable and timely implementation of the injunctive relief being sought. Should the requested relief ultimately be denied, any error in such denial may be reviewed on appeal. Plaintiffs assert that they will be unnecessarily put to the burden of a hearing. Even were a hearing unnecessary or improper, however, that would not be a sufficient ground for mandamus. That "hardship may result from delay and perhaps unnecessary trial," or that a ruling may "give rise to a myriad of legal and practical problems as well as inconvenience," is not alone a sufficient reason to invoke mandamus to control the interlocutory rulings of the trial court, even though they may be clearly wrong. *Bankers Life & Casualty Co.*, 74 S.Ct. at 148. *See also Rocke*, 82 S.Ct. at 943, 944; *Will v. United States*, 88 S.Ct. at 274, 278. We stated in *Piekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir.1977):

> "Expense and inconvenience, without more, do not justify the issuance of mandamus.
>
> "....
>
> "Undoubtedly, plaintiff has been frustrated by the proceedings thus far in the prosecution of his case and it may be that ultimately an expensive retrial may be necessary. However, we find nothing extraordinary in these circumstances that should cause us to resort to such a drastic remedy."

Compare Elster v. Alexander, 608 F.2d 196, 197 (5th Cir.1979). These principles also establish that mandamus is inappropriate here.

[10] Finally, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, 96 S.Ct. at 2124. To the extent that we have discretion in the matter, we decline to issue the writ, for the reasons heretofore expressed.

CONCLUSION

Accordingly, the appeals are each DISMISSED for want of an appealable order. The petition for writ of mandamus is DENIED.

Ronald S. MONROE,
Petitioner-Appellant,

v.

Frank BLACKBURN, Warden, Louisiana State Penitentiary, Angola,
Respondent-Appellee.

No. 84-2281.

United States Court of Appeals,
Fifth Circuit.

Dec. 6, 1984.

Petitioner, who was convicted in Louisiana of first-degree murder and sentenced to death, appealed from an order of the United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., which ordered the State to reconsider his motion for a new trial under Louisiana law. The Court of Appeals, Reavley, Circuit Judge, held that: (1) habeas petitioner, who obtained an order requiring State to reconsider his motion for new trial based on District Court's finding that petitioner's right to due process under *Brady* had been violated during postconviction relief period but who failed to show that his right to a fair trial was prejudiced by the postconviction suppression of evidence, was not prejudiced by District Court's failure to grant him a new trial; (2) trial court did not

abuse its discretion under *Witherspoon v. Illinois* by dismissing from murder trial potential jurors who made it clear that they would not consider the death penalty under any set of facts and circumstances; and (3) petitioner was not denied effective assistance of counsel.

Affirmed.

1. Habeas Corpus ⇐113(6)

State's argument that habeas petitioner should not have been granted an additional hearing in state court was not before reviewing court where State failed to cross-appeal from federal habeas court's order requiring State to reconsider petitioner's motion for new trial.

2. Habeas Corpus ⇐25.1(4)

Habeas petitioner, who obtained an order requiring State to reconsider his motion for new trial based on district court's finding that petitioner's right to due process under *Brady* had been violated during postconviction relief period but who failed to show that his right to a fair trial was prejudiced by the postconviction suppression of evidence, was not prejudiced by district court's failure to grant him a new trial. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐85.5(8)

Habeas petitioner failed to establish that Louisiana trial judge "coerced" the jury in his murder trial so as to cause it to return a death sentence after foreman had requested instructions on procedure to follow in event that a deadlock could not be broken. U.S.C.A. Const.Amends. 8, 14; LSA-C.Cr.P. art. 905.8.

4. Jury ⇐106

Venireman's responses and his statement that he would consider imposition of death penalty only if defendant confessed to crime of murder was the equivalent to the position that he would not consider the death penalty under any circumstances.

5. Jury ⇐106

Trial court did not abuse its discretion under *Witherspoon v. Illinois* by dismissing from murder trial potential jurors who made it clear that they would not consider the death penalty under any set of facts and circumstances.

6. Habeas Corpus ⇐89

Federal habeas court did not abuse its discretion in failing to order a separate evidentiary hearing on issue of whether petitioner, who was convicted of first-degree murder, might be able to establish that a *Witherspoon*-qualified jury would be predisposed to favor the prosecution on issue of guilt. 28 U.S.C.A. § 2254(d).

7. Criminal Law ⇐641.13(2)

Petitioner, who was convicted of murder in a Louisiana state court, was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

Allan Blumstein, Steven Gey, Douglas G. Morris, Matthew Fishbein, Eric Freedman, New York City, John DiGiulio, Baton Rouge, La., for petitioner-appellant.

Wm. R. Campbell, Jr., Susan Scott Hunt, Asst. Dist. Attys., New Orleans, La., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

REAVLEY, Circuit Judge:

Ronald S. Monroe was convicted in Louisiana of first degree murder and was sentenced to death. After exhausting his state remedies, he filed this petition for habeas corpus. The district court held that Monroe's right to due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1964), had been violated during the post-conviction relief period, and it ordered the State to reconsider Monroe's motion for a new trial under Louisiana law. Monroe appeals contending that it was error for the district court not to order the State to grant him a new trial. We affirm.

I. *Facts*

Ronald Monroe was the neighbor of the murder victim, Lenora Collins, who lived in the adjoining one-half of a duplex in New Orleans, Louisiana. He was convicted on January 22, 1980, of her murder after being identified as the murderer by the victim's two children.

The federal district court heard Monroe's application under 28 U.S.C. § 2254 (1982) and held that all of his claims lacked merit except for his claim that he was denied due process. It ordered an evidentiary hearing on that issue before a federal magistrate where it was disclosed that a New Orleans policeman had taken notes of a July 1980 conversation with a detective in Michigan. The notes stated that Collins' former common-law husband, who had murdered his common-law wife in Michigan, made statements indicating he might have murdered Collins as well. These notes were not considered by the state court in its disposition of Monroe's motion for a new trial. Because the State had failed to disclose this information to Monroe, the magistrate concluded that his due process rights under *Brady* had been violated.

The district court adopted the findings and conclusions of the magistrate; however, because the violation occurred during the post-conviction relief period, the court did not order the State to grant Monroe a new trial. Instead, it ordered the State "to grant [Monroe] whatever he was entitled to by way of post-conviction relief ... provided by Louisiana law for a request for a new trial based upon the exculpatory material which the state courts did not have an opportunity to consider."

It is from this judgment of the district court that Monroe appeals, arguing that he should have been granted a new trial as a matter of law. He also raises four other issues. First, he argues that he was sentenced in violation of double jeopardy. Second, he asserts that certain venire members were excluded from the jury in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Third, he argues that he was improperly denied a separate evidentiary hearing on the question whether the "death-qualified" jury that convicted him was predisposed to favor the prosecution on the issue of guilt. Finally, Monroe claims that he was denied effective assistance of counsel.

II. *Discussion*

A. *Suppression of Material Evidence*

[1] The State argues that Monroe should not have been granted an additional hearing in the state court. That question is not before us because the State failed to cross-appeal. *See RobicAseux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir.1982). The State argues that we should consider this point to prevent a miscarriage of justice. *See Fyrnach v. Estelle*, 696 F.2d 318 (5th Cir.1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983). We see no miscarriage of justice here, although we might have reached a different conclusion from that of the district court.

[2] Monroe claims, however, that the district court erred by failing to grant him a new trial. We disagree. The new trial remedy afforded after a *Brady* violation has occurred is given because the defendant's right to a fair trial has been prejudiced by the suppression of evidence. *See United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). Monroe has failed to show that his right to a fair trial was prejudiced by the post-conviction suppression of evidence. Indeed, the existence of prejudice to Monroe, arising from the State's failure to disclose the existence of the policeman's notes, is doubtful since the same underlying information was apparently considered as newly discovered evidence in Monroe's motion for new trial. Because an additional state hearing is to be held, in which all of the information will be considered, there is no possibility that Monroe's rights will be prejudiced.

B. *Double Jeopardy*

[3] During the sentencing phase of the trial, the jury returned after approximately forty-five minutes of deliberation, and the foreman indicated that a unanimous deci-

sion could not be reached. The foreman also requested instructions on the procedure to follow in the event the deadlock could not be broken. The trial judge responded by instructing the jury that if it was unable to agree unanimously upon a verdict within a reasonable time, a life sentence would be imposed. Monroe claims that the trial judge "coerced" the jury and violated his rights to a fair trial and due process, as well as article 905 of the Louisiana Code of Criminal Procedure, by failing to impose the life sentence at this point.

Aside from any constitutional question, Monroe has no Louisiana authority to indicate that a life sentence must be imposed whenever a trial judge requires a jury to deliberate for a reasonable time before finding that the jurors cannot agree. We see nothing in this record indicating that the trial judge "coerced" the jury, causing it to return the death sentence. Under Louisiana law, the trial judge is the one who determines when a jury is hung for purposes of the applicable statute, La.Code Crim.Proc.Ann.Art. 905.8 (West 1984). The Louisiana Supreme Court held in Monroe's direct appeal that a "palpable abuse of discretion" was not shown. *State v. Monroe*, 397 So.2d 1258, 1271-72 (La.1981). We accept that decision and reject the argument that a constitutional deprivation occurred.

C. *Witherspoon and Fair Trial*

1. *Voir Dire*

[4, 5] Monroe argues that the state trial court abused its discretion by dismissing four venire members. First, we regard John Lee's responses and his statement that he would consider the imposition of the death penalty *only if* the defendant confessed to the crime to be equivalent to the position that he would not consider the death penalty under any circumstances. Second, Florence LeDoux responded: "If we had to recommend the death penalty, I couldn't do it." Carl Woods and Clarence E. Matthews responded similarly. These venire members made it clear that they would not consider the death penalty under any set of facts and circumstances. The trial court did not abuse its discretion under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), by dismissing these potential jurors. *See O'Bryan v. Estelle*, 714 F.2d 365, 372 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

2. *The "Conviction-Prone" Jury*

[6] The Supreme Court in *Witherspoon* left open the question whether a defendant might be able to establish that a *Witherspoon*-qualified jury would be predisposed to favor the prosecution on the issue of guilt. 391 U.S. at 521 n. 18, 88 S.Ct. at 1775 n. 18, 20 L.Ed.2d at 784 n. 18. Monroe asserts that the district court should have ordered a separate evidentiary hearing on that issue, arguing that the Supreme Court implicitly adopted such a requirement in *Maggio v. Williams*, — U.S. —, —, 104 S.Ct. 311, 314, 78 L.Ed.2d 43 (1983). We disagree.

We read *Williams* as a comment on the discretion of the district court in its denial of an evidentiary hearing. In this case, the district court reviewed the findings of the state court and saw no reason for a separate evidentiary hearing. This denial was within its discretion under 28 U.S.C. § 2254(d) (1982).

D. *Effective Assistance of Counsel*

[7] Monroe argues that he was denied effective assistance of counsel because his counsel, John Lawrence, did not investigate the possibility that the victim's former common-law husband had committed the murder. However, Lawrence did interview three other witnesses and he was given no reason to investigate the ex-husband. He indicated that he never considered the "matter as worth much." He assumed that the eyewitness identification of Monroe as the murderer precluded the possibility that someone else had killed her. Monroe was not denied effective assistance; Lawrence made "a reasonable decision that [made further investigation] unnecessary." *Strickland v. Washington*, — U.S. —,

——, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

Monroe also argues that he was denied effective assistance of counsel because of Lawrence's handling of the sentencing phase of the trial. During that stage of the trial, Lawrence tried to convince the jury of the immorality of the imposition of the death penalty, and of its ineffectiveness as a deterrent against crime. He called as witnesses a priest, a social worker, a professor of criminology, and Monroe's mother. Lawrence also put on evidence of Monroe's lack of a criminal record, his age and his intoxication on the night of the crime. A reasonable effort was put forth in preparing this defense. We recognize that there was very little reason to expect an anti-capital-punishment argument to persuade a *Witherspoon*-qualified jury not to impose the death sentence, but Lawrence made a reasonable choice with the evidence available to him. We agree with the district court's decision that Monroe was not denied effective assistance of counsel.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Oscar W. WESLEY and Velma Cooper, Defendants-Appellants.

No. 84-3357.

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1984.

Defendant was convicted in the United States District Court for the Middle District of Louisiana, at Baton Rouge, Frank J. Polozola, J., of possessing a firearm after having been convicted of a felony, influencing due administration of justice, and tampering with a witness, and codefendant was convicted of obstructing the due administration of justice, and they appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that defendant who was alleged to have urged and advised witness to testify falsely was properly charged with both obstruction of justice and with intimidating a witness under another statute.

Affirmed.

1. Obstructing Justice ⇐4

By enacting new statute to address certain kinds of witness intimidation and simultaneously deleting from earlier statute, which prohibits obstruction of the due administration of justice, all references to witnesses, Congress did not intend that threats against witnesses would fall exclusively under the new statute and be exempt from prosecution under the earlier statute; earlier statute remains applicable to obstruction of the administration of justice by attempts to influence witnesses. 18 U.S.C.A. §§ 1503, 1512.

2. Criminal Law ⇐29, 299(1)

Defendant who was charged with urging and advising witness to testify falsely was properly charged with both obstruction of justice and with intimidating witness under another statute, with result of that convictions under both statutes were not multiplicious or violative of double jeopardy clause. 18 U.S.C.A. §§ 1503, 1512; U.S.C.A. Const.Amend. 5.

J. Michael McDonald (Court-Appointed), Baton Rouge, La., for Wesley.

David E. Stanley (Court-Appointed), Baton Rouge, La., for Cooper.

Stanford O. Bardwell, U.S. Atty., Merrick J. Norman, Jr., Asst. U.S. Atty., Baton Rouge, La., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Louisiana.